Supreme Court, U.S.
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No. 02-202

IN THE

Supreme Court of the United States

D.L. CROMWELL INVESTMENTS, INC., LLOYD BEIRNE, DAVID S. DAVIDSON, ERIC S. THOMAS, and MATTHEW GREENWALD,

Petitioners,

v.

NASD REGULATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner, D.L. Cromwell Investments, Inc.'s corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Treatise:

11 Wright & Miller, *Federal Practice and Procedure*, § 2950 4-5

ARGUMENT FOR GRANTING THE WRIT

In its opposition brief, the respondent claims that certiorari should not be granted in this case because the petitioners have not established a sufficiently compelling reason to grant certiorari. Instead, the respondent contends that the Second Circuit correctly identified the precedent governing consolidation of a preliminary injunction hearing with a trial on the merits and that the instant petition merely takes issue with the misapplication of the correctly stated precedent to the facts of this case. The respondent further contends that, even if the Second Circuit did not apply the correct precedent, this case is nonetheless not a proper vehicle to review such a deviation from established precedent because the petitioner purportedly waived any objection to the consolidation.

As discussed below, the respondent's arguments are not only meritless but they are based on a mischaracterization of the record and certiorari is now properly granted. The record in this case evidences the fact that the Second Circuit upheld the trial court on the basis of what it concluded was constructive notice of the consolidation of the preliminary injunction hearing with a trial, a standard which was a marked departure from prior precedent of this Court and other circuit courts that require explicit, timely and unambiguous notice. Moreover, the consolidation occurred over the objection of petitioners, a fact which is not only evidenced by the record but which was acknowledged by the Second Circuit in its decision below.

A. The Second Circuit's Decision Deviated from Prior Precedent of this Court and the Decisions of Other Circuit Courts.

In its brief in opposition, the respondent acknowledges, as it must, that this Court's decision in *University of Texas v. Camenisch*, 451 U.S. 390, 101 S. Ct. 1830 (1981) is the controlling precedent governing the consolidation of a preliminary injunction hearing with a trial on the merits. As stated by this Court in *Camenisch*, such a consolidation cannot occur without "clear and unambiguous notice [of the Court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Id.* at 395. The rationale for requiring such timely, clear and unambiguous notice is that the burden of proof at a preliminary injunction hearing is far less stringent than the burden at trial and, therefore, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits. (citations omitted)" *Id.* Accordingly, to the extent that a trial court takes the unusual procedural step of ordering the consolidation of a preliminary injunction hearing with a trial on the merits, the court may not do so without affording the parties the requisite notice and opportunity to present their entire case.

In the instant case, the trial court consolidated the preliminary injunction hearing with a trial on the merits after the hearing had already been completed and denied the petitioner's request for leave to take two weeks of discovery when the trial court announced its belated intention to order consolidation. The consolidation of the preliminary injunction hearing with a trial under such circumstances was clearly not in accord with *Camenisch*. Nor was it in accord

with the holdings of various circuit courts that have determined that a party is deprived of the requisite "full opportunity" to present their entire case on the merits if consolidation occurs without allowing a party the opportunity to engage in discovery. *Pughsley v. 3750 Lake Shore Drive Co-op Bldg.*, 463 F.2d 1055 (7th Cir. 1972); *Gellman v. State of Maryland*, 538 F.2d 603 (4th Cir. 1976). As stated by the Fourth Circuit in *Gellman*:

> To grant judgment on the merits under Rule 65(a)(2) without any notice of such intention until the conclusion of the evidentiary hearing on the motion for a preliminary injunction . . . without requiring answers to interrogatories or permitting any discovery in a case which, on the pleadings at least, is not frivolous, comes perilously close to a violation of due process.

Gellman, 538 F.2d at 605.

In reviewing the trial court's consolidation of the trial and preliminary injunction hearing at the conclusion of the preliminary injunction hearing in this case and its denial of the petitioners' request for leave to take two weeks of discovery, it is readily apparent that the Second Circuit did not apply the precedent established by *Camenisch*, *Pughsley* and *Gellman*. First, rather than evaluate the trial court's ruling on the basis of the standard of timely, clear and unambiguous notice, the belated notice of consolidation was deemed sufficient because the petitioners were purportedly placed on constructive notice that the issue to be considered at the preliminary injunction hearing — whether the NASD was a state actor — would necessarily be dispositive of the entire case. This concept of constructive notice, however, was and

is a radical departure from *Camenisch*, where this court imposed the requirement of express and timely notice of consolidation because, normally, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. (citations omitted)" *Camenisch*, 451 U.S. at 395. For this reason, a party is not expected to divine the court's intention to order consolidation but must be advised clearly and unambiguously with sufficient opportunity to prepare for a trial on the merits.

Second, the Second Circuit further departed from *Camenisch* and prior precedent of other circuit courts when it denied the petitioners' request for leave to conduct discovery and concluded that discovery had been waived by the petitioners because of the petitioners' election to seek preliminary injunctive relief. The Second Circuit chastised the petitioners for requesting two weeks to take discovery because it purportedly "contradicted the claim of urgency that evidently induced the court to immediately hear the preliminary injunction motion in the first instance." App. 8a. However, the reasoning of the Second Circuit, taken to its logical conclusion, would mean that every plaintiff seeking preliminary injunctive relief would be deemed to have elected to forego discovery in order to obtain immediate judicial intervention, a result which in not in accord with prior precedent. As noted by Judge Stevens, when he wrote for the majority in *Pughsley*, "a litigant applying for a preliminary injunction should seldom be required either to forego discovery in order to seek emergency relief, or to forego a prompt application for an injunction in order to prepare adequately for trial." *Pughsley*, 463 F2d at 1057. Instead, in the event of consolidation, a litigant must be afforded the opportunity to obtain discovery. *Pughsley*; *Gellman*; 11 Wright & Miller, *Federal Practice and Procedure*, § 2950

at p. 488. In the absence of such a procedure, a litigant is deprived of the opportunity mandated by *Camenisch* to present their entire case.

Third, the Second Circuit further deviated from *Camenisch*, *Pughsley* and *Gellman* when it concluded that the petitioners could not demonstrate any prejudice resulting from the failure of the court to provide either timely notice of consolidation or leave to conduct discovery unless the petitioners could identify specific evidence that it was precluded from presenting at the preliminary injunction hearing. However, the petitioners were prejudiced by virtue of both the absence of advance notice and the inability to obtain discovery. *Pughsley*, 538 F.2d at 604-605 ("... the reasonable 'opportunity' to present his [plaintiff's] case, which must be given a party before Rule 65(a)(2) may be invoked, is not satisfied, it would seem, by notice given, as here, after the evidentiary hearing had been concluded."); *T. M. T. Trailer Ferry v. Union De Tronquistas P.R. Loc. 901*, 453 F.2d 1171, 1172 (1st Cir. 1971) ("... Although there is no indication that plaintiff would have produced further testimony if notified earlier that the entire case would be disposed of after a single hearing, this does not sanction the court in changing, sub silentio, the nature of the game at halftime.")

Neither *Reese Pub. Co.. Inc. v Hampton International Communications. Inc.*, 620 F.2d 7, 12 (2d Cir. 1980) or *Johnson v. White*, 528 F.2d 1228 (2d Cir. 1975), the cases relied upon by the Second Circuit on the issue of demonstrable prejudice, are to the contrary. Neither of the appellants in *Reese* and *Johnson* objected to consolidation when it was ordered by the trial court at the conclusion of the preliminary injunction hearing and neither of the

appellants in those cases requested leave to conduct discovery. In *Reese*, prior to the close of the hearing, the trial court repeatedly indicated its intention to order consolidation. *Reese*, 620 F.2d at 12. When the trial court ultimately ordered consolidation, the appellant did not object to consolidation but sought instead to introduce evidence of the "secondary meaning" of a generic term to establish a trademark. The Second Circuit held that the appellant was not prejudiced by the District Court's refusal to allow evidence on this point because the law is well settled that a generic term cannot be established as a trademark by proof of secondary meaning. *Id.* In *Johnson*, the Second Circuit remanded the matter on other grounds and noted the appellants could not complain of error arising from the consolidation by the trial court because they would be given the opportunity to present further evidence on remand. *Johnson*, 528 F.2d at 1231.

B. The Petitioners Did Not Waive Their Objection to Consolidation.

The respondent has further mischaracterized the record in arguing, as it does, that the petitioners did not object to consolidation and thereby waived any objection to consolidation by the trial court. In making this argument, the respondent has purposefully omitted reference to the relevant portions of the record where the petitioners clearly noted their objection. Indeed, when quoting from the record of the hearing, the Respondent omitted colloquy that evidenced the petitioners' repeated request for discovery as a condition of consolidation. (A53.1 to A53.5). Among the numerous indications of the repeated request by petitioners for discovery was the following colloquy:

THE COURT:

Is there any reason that I should not consolidate the trial on the merits with the preliminary injunction and consider the affidavits as in evidence and take this matter for final resolution at this point?

MS. REICHER [COUNSEL FOR RESPONDENT]:

No objection.

MR. RUSSO [COUNSEL FOR PETITIONERS]:

We have not had any opportunity to have any discovery. I believe that, upon having some discovery —

THE COURT:

If the injunction is denied, the case is going to be moot by the time you have discovery, right?

MR. RUSSO [COUNSEL FOR PETITIONERS]:

That may or may not be true because, if we do, if the injunction is denied and my clients don't testify, there is a process by which the NASD may bar them. The answer is —

THE COURT:

For which this litigation is not a discovery proceeding.

(A53.1-53.2)

The record further reflects that the petitioners proceeded to request two weeks of discovery, which was denied by the trial court. (A53.3 to A53.4) The petitioners then noted repeatedly during closing argument that discovery was needed and that prejudice was caused by the refusal to permit such discovery. (February 15, 2001 Transcript, pp. 121-125).

Not surprisingly, the Second Circuit recognized that the above-quoted colloquy, together with other portions of the record, preserved the petitioners' objection to consolidation. The court noted that "the preliminary injunction hearing was consolidated with the trial on the merits (*over Cromwell's objection*) after the district court heard testimony from witnesses for both Cromwell and NASD, and before the rendering of the decision." (Emphasis supplied) App. 2a.

CONCLUSION

Based upon the foregoing, the petitioners respectfully submit that the instant petition for a writ of certiorari should be granted.

Respectfully submitted,

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